BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JENNIFER M. KRINHOP Claimant VS. **U.S.D. 475** Respondent AND **KANSAS ASSOCIATION OF SCHOOL BOARD WORKERS COMPENSATION FUND, INC.** Insurance Carrier	)	Docket No. 1,044,524

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 2, 2009, preliminary hearing Order entered by Administrative Law Judge Rebecca A. Sanders. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Anton C. Andersen, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was injured in a series of accidents that arose out of and in the course of her employment at respondent. The ALJ further found that claimant's date of accident, pursuant to K.S.A. 2008 Supp. 44-508(d), was February 23, 2009, and, therefore, claimant had provided respondent with timely notice of her series of accidents. Respondent was ordered to pay claimant temporary total disability benefits based on an average weekly wage of $335.10. Respondent was further ordered to provide claimant with a list of three physicians from which she could chose one as her authorized treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 30, 2009, Preliminary Hearing and the exhibits, including the transcript of the discovery deposition of claimant taken March 16, 2009; the transcript of the deposition of Cynthia Gabe taken June 26, 2009, and the exhibits; the transcript of the

deposition of Shelly Gunderson taken June 26, 2009, and the exhibit; and the transcript of the deposition of Ardena Carlyon taken June 26, 2009, and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent asserts that claimant's alleged back injury did not arise out of and in the course of her employment with respondent. In the alternative, the respondent contends that claimant did not provide it with timely notice of her alleged accident or series of accidents, and further argues that the ALJ's finding that claimant's date of accident was February 23, 2009, was not logical because claimant's last day worked was in October 2008. Further, respondent contends that claimant was terminated for cause, thereby precluding her from receiving temporary total disability benefits.

Claimant asserts that the evidence proves that she suffered injuries that are causally related to her work activities at respondent. She further contends that the ALJ properly computed her date of accident to be February 23, 2009, and, therefore, she provided respondent with timely notice of her accident. In response to respondent's argument concerning whether she is entitled to temporary total disability benefits, claimant argues that the Board does not have jurisdiction to decide that issue on an appeal from a preliminary hearing.

The issues for the Board's review are:

(1) Are claimant's alleged injuries the result of a series of accidents that arose out of and in the course of her employment with respondent?

(2) Did claimant give respondent timely notice of her series of accidents?

(3) Is claimant precluded from receiving temporary total disability benefits because she was terminated from her employment with respondent for cause?

FINDINGS OF FACT

Claimant began working for respondent on August 21, 1998, as a custodian. She continued to work as a custodian for respondent until August 31, 2006. On September 1, 2006, she continued to work as a custodian in respondent's buildings. However, respondent had contracted out the custodial work to a private company, Aramark, and claimant was an employee of Aramark. Claimant testified that in August 2007, she again began working for respondent, this time as the main dish cook.[1]

[1] Cynthia Gabe, claimant's supervisor, testified that claimant started working under her as a main dish cook on November 19, 2007. Gabe Depo. at 6.

Claimant testified that after she came to work for respondent, she began having problems with her back. These problems appeared gradually and worsened as time went on. She testified that she did not have any one specific accident but claims her back condition was the result of her daily work activities that required her to do repetitive bending and lifting. As a custodian, she moved furniture, shoveled snow, lifted mop buckets, and ran floor scrubbers. As a cook, she lifted pots and pans and boxes of food. She estimated that she bent over 50 times an hour while working as a cook, and also said she had to unload supplies from trucks onto a cart and then move the supplies to the freezers. She testified that her back got worse after she started her position as a cook.

Claimant was being treated for her back problems by her family physician, Dr. Ronald Mace, in September and October 2008. Claimant testified that she has three bulging discs and has severe back pain every day that radiates down to her right hip and down into her right leg. She said Dr. Mace wanted to give her restrictions but Ms. Gabe told her she could not work with written restrictions. Instead, she and Ms. Gabe agreed that her hours would be reduced. Ms. Gabe said that on October 13, 2008, claimant's hours were officially reduced from eight per day to six per day. Ms. Gabe testified that claimant requested this reduction in hours so she could drive her daughter to school.

Dr. Mace took claimant off work from October 7 through October 23, 2008. Claimant testified she gave the off-work slip to Ms. Gabe on or about October 7. Claimant testified that she specifically told Ms. Gabe that she believed her back problems were related to her work activities as a main dish cook and asked about filing a workers compensation claim. She testified that Ms. Gabe, however, told her she did not have the workers compensation paperwork on site. Claimant also said that Ms. Gabe said she would need to talk to her boss, Shelly Gunderson, because claimant did not have a date of accident. It was claimant's understanding that without a specific date of accident, she could not file a claim under workers compensation. Respondent did not offer to provide claimant with medical treatment.

Dr. Mace referred claimant to Dr. Steven Peloquin, whom she saw on October 31, 2008. In the history claimant gave Dr. Peloquin, she denied any known injury but said her pain developed over 10 years. Claimant testified she told Dr. Peloquin that her back and right hip pain were caused by the lifting she was doing at work but that it had started when she worked as a custodian. Dr. Peloquin opined that claimant was:

> [a] patient with very mild degenerative changes in her lumbar spine but has been going on for years, probably some overexertion. She now has low back pain consistent with facet disease . . . . She has bilateral sacroiliitis secondary to altered gait. She walks hunched over and shuffles her feet. She has bulging disks that

> have irritated the sciatic nerve over the years and now she has significant sciatic piriformis complex inflammation and sciatica.[2]

Claimant testified that Dr. Peloquin provided her with an off-work slip, which she took to respondent. Claimant was then told she had been terminated for not showing up for work and not calling when the off-work slip from Dr. Mace expired on October 23. Claimant testified, however, that she had earlier given Ms. Gabe some paperwork requesting a leave of absence for a period of time before and after her daughter's surgery, which was scheduled for October 29, 2008.

Cynthia Gabe confirmed that a main dish cook would be required to bend at the waist but said that claimant would not have had to bend at the waist 50 times an hour. Rather, she estimated claimant would bend at the waist about 20 times a day. She also said that claimant would not have to lift as often as she had testified. She said it would not have been part of claimant's job to unload supplies from a truck.

Ms. Gabe said that although claimant spoke with her about her back problems, it was only about needing to take time off for doctor's appointments. Ms. Gabe said that at no time did claimant tell her that her back problems were related to her work activities. She testified that claimant told her that her doctor said her back problems were degenerative and were related to a gait disorder. She denied that claimant had ever asked to file a workers compensation claim, nor did claimant ask that respondent provide her with any medical treatment. She denied telling claimant that she would be unable to work at respondent with restrictions or that she did not want claimant to file a workers compensation claim.

Shelly Gunderson testified that she is the director over food service for respondent. On October 13, 2008, claimant gave her an off-work slip from Dr. Mace's office. Ms. Gunderson asked claimant why she had been off, and claimant told her she was having back problems. Claimant did not say that the problems were related to her work or say that her work was aggravating or accelerating her back problems. She did not ask respondent to provide her with medical treatment, nor did she ask to fill out a workers compensation claim form. Ms. Gunderson did not ask claimant if the medical treatment she was receiving was related to her work. Ms. Gabe had told Ms. Gunderson earlier, probably in September, that claimant was having back problems. At that time Ms. Gunderson asked Ms. Gabe it the problems were work related, and Ms. Gabe said no.

Ardena Carlyon is the assistant treasurer/classified personnel clerk at respondent. She said that claimant came in on October 31, 2008, with an off-work slip, but Ms. Carlyon told her she had been terminated for not showing up or calling in for a three-day period after October 23. When Ms. Carlyon spoke with claimant on October 31, claimant did not

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[2] P.H. Trans., Resp. Ex. A at 3.

say that the off-work slip was related to her work or that she had been injured on the job, and she did not ask. The first time Ms. Carlyon got notice that claimant was making a workers compensation claim was when she received a letter from claimant's attorney dated February 23, 2009. Upon receipt of that letter, she checked to see if claimant had reported a workers compensation accident, and no one told her they had been notified of one.

PRINCIPLES OF LAW AND ANALYSIS

(1) Are claimant's alleged injuries the result of a series of accidents that arose out of and in the course of her employment with respondent?

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[3] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which

[3] K.S.A. 2008 Supp. 44-501(a).

[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

Claimant has a long history of low back and leg problems. Because of her worsening low back and leg symptoms, claimant sought medical treatment in October 2008. She was given time off work and restrictions. Claimant attributes her worsened symptoms to her work with respondent. Claimant's physicians agree that claimant's job duties contributed to the aggravation of her degenerative back condition. Although certain physicians describe claimant's job as a custodian, it is clear that the tasks claimant performed as a cook likewise required heavy lifting, repetitive bending and prolonged standing.

This Board Member agrees with the ALJ that the record presented to date establishes a work-related aggravation of claimant's degenerative low back condition by a series of repetitive traumas through October 13, 2008, the last day she performed work as a cook for respondent.

(2) Did claimant give respondent timely notice of her series of accidents?

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2008 Supp. 44-508(d) states in part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts

[5] *Id.* at 278.

> the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.

Although claimant's last injurious exposure occurred on October 13, 2008, the last day claimant actually performed her regular job duties, this date is not the "date of accident" for purposes of giving notice. Instead, the date of accident for a series is controlled by K.S.A. 2008 Supp. 44-508(d). The ALJ correctly applied K.S.A. 2008 Supp. 44-508(d) to the facts of this claim to find the date of accident was the date upon which claimant gave respondent written notice of her injury.[6] As such, notice was timely.

(3) Is claimant precluded from receiving temporary total disability benefits because she was terminated from her employment with respondent for cause?

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2006 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including

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[6] *Saylor v. Westar Energy, Inc.*, 41 Kan. App. 2d 1042, 207 P.3d 275, *rev. pending* (2009). This Board Member disagreed with the majority in *Saylor v. Westar Energy, Inc.*, Docket No. 1,028,185, 2008 WL 375802 (Kan. WCAB Jan. 15, 2008), and wrote a concurring opinion in which I and one other Board Member said that the Legislature did not contemplate a date of accident after the last day an injured worker performed work for the employer. However, this decision reflects the opinion of the majority of the Board and now the Court of Appeals.

> testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

On an appeal from a Preliminary Hearing Order, the Board is without jurisdiction to review the ALJ's conclusion that claimant is entitled to temporary total disability compensation.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

CONCLUSION

(1) Claimant suffered an aggravation of a preexisting condition as a result of a series of accidents that arose out of and in the course of her employment with respondent.

(2) Notice was timely given.

(3) The Board is without jurisdiction to decide this issue on an appeal from a Preliminary Hearing Order.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated July 2, 2009, is affirmed.

IT IS SO ORDERED.

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[7] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2008 Supp. 44-555c(k).

Dated this _____ day of October, 2009.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge